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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.....

B. C. SCHRAM, Receiver of First National Bank-Detroit,
a National Banking Association,
Petitioner,

vs.

JOSEPH L. COYNE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, The Chief Justice and Associate Justices of
the Supreme Court of the United States:

Your petitioner, B. C. Schram, Receiver of First National Bank-Detroit, a National Banking Association, respectfully represents unto the Court as follows:

SUMMARY STATEMENT

B. C. Schram, petitioner herein, is the duly qualified and acting Receiver of the First National Bank-Detroit, an insolvent national banking association, whose affairs are being wound up under the direction of the Comptroller of the Currency of the United States (R. 24-25). In the exercise of the duties imposed upon him by the National Banking Act, the petitioner filed this action in the United States District Court for the Eastern Dis-

trict of Michigan to recover a judgment against the defendant upon a note, indenture of mortgage and mortgage assumption covenant.

The case was tried in the District Court upon an agreed stipulation of facts (R. 22-34). As set forth therein, one Adolph Deutsch and his wife, on August 10, 1926, executed and delivered a promissory note and a mortgage securing the same to a bank in Detroit, whose assets were subsequently transferred to First National Bank-Detroit. Over their signatures and seals, the Deutsches in the mortgage expressly covenanted to "pay to the said mortgagee, its successors, legal representatives and assigns, the said sum of Twenty-five Hundred Dollars (\$2,500.00) with interest" (R. 16). The mortgage further provided that the covenants contained therein, including this covenant to pay the principal sum and interest, "shall run with the land" (R. 18).

Less than two months later, the Deutsches conveyed the mortgaged property by warranty deed dated September 13, 1926, to the respondent herein, Joseph L. Coyne (R. 23). The deed was properly recorded and conveyed the premises with the warranty that said premises were **"free from all encumbrances whatever, except a mortgage of Twenty-five Hundred Dollars (\$2,500.00) to the American State Bank, a Michigan corporation, which party of the second part assumes and agrees to pay according to its terms and stipulations"** (R. 11-12). The deed was signed and sealed by the Deutsches. Coyne did not sign either the original note or mortgage executed by the Deutsches or the warranty deed, but it was stipulated below that he did accept delivery of said deed (R. 23).

Payments on principal and interest were made from time to time, the last voluntary payment being made by

Coyne on July 28, 1932 (R. 24). Coyne having defaulted, the mortgage was foreclosed by advertisement pursuant to the power of sale contained in the mortgage (R. 23). The premises were sold on September 5, 1935, and the proceeds thereof credited on the amounts due under the terms of the note and the covenants in the mortgage, leaving a deficiency due on the principal and interest of Five Hundred Five and 35/100 Dollars (\$505.35) as of the date of sale (R. 23-24). Subsequently the petitioner filed this action against Coyne to collect the deficiency due upon the note and mortgage. The respondent filed an answer setting forth a number of defenses, all of which, with the exception of the plea of the statute of limitations, were brushed aside by the District Court (R. 35).

The action below was commenced more than six but less than ten years after the last voluntary payment made by Coyne pursuant to his assumption of the mortgage (R. 24). The real and only question in the case was whether the action brought by the petitioner was barred by the six year Michigan statute of limitations relating to simple contracts or by the ten year Michigan statute of limitations relating to covenants.

The District Court held that the six year statute of limitations applied and dismissed the petitioner's complaint on November 20, 1940 (R. 39). Upon appeal the United States Circuit Court of Appeals for the Sixth Circuit affirmed the decision of the trial court (R. 45).

OPINIONS BELOW

The District Court filed a written opinion on November 14, 1940, which is unreported (R. 34-38). The Sixth Circuit Court of Appeals handed down a written opinion on April 15, 1942 (R. 46), reported in 127 Fed. (2d) 205.

JURISDICTION

The judgment of the Circuit Court of Appeals to be reviewed was entered April 15, 1942 (R. 45).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (Title 28 U.S.C., Section 347).

THE QUESTIONS PRESENTED

1. Is an action at law brought in Michigan to collect a mortgage deficiency from the mortgagor's grantee, who assumed and agreed in the deed of conveyance to pay the mortgage debt and to assume the covenants in said mortgage, an action upon a covenant or an action upon a simple contract?

2. If the question presented is purely one of local Michigan law, and there is no applicable Michigan statute and no controlling Michigan decision covering the point raised, shall the Federal Court sitting in Michigan decide this question, or shall it refer it for decision to the state courts of Michigan?

REASONS RELIED UPON FOR THE ALLOWANCE OF A WRIT OF CERTIORARI

1. The Sixth Circuit Court of Appeals specifically held that the single question of law presented in this case had not been decided by the Michigan courts (R. 46). Under these circumstances, it was the duty of the Court of Appeals under the decisions of this Court, not to attempt to apply what it considered to be the general weight of authority, but to refer this question of law for determination to the state courts of Michigan. *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940), and *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941).

2. The application of the decision of the Court of Appeals is not limited to the rather small amount involved in this case. It will affect hundreds of similar claims held by the petitioner as Receiver of First National Bank-Detroit as well as numerous suits involving similar claims brought by the petitioner and presently pending in the District court in Detroit. Since the Federal Courts are controlled by the decisions of State Courts in matters of local law such as is here involved (*Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938)), the rights and interests of the creditors and shareholders of the First National Bank-Detroit and of other national bank receiverships in Michigan would be seriously prejudiced by this decision, should the Michigan courts subsequently decide the specific question of local law involved herein contrary to that of the Court of Appeals.

3. The decision of the Sixth Circuit Court of Appeals is directly contrary to the available Michigan decisions bearing upon the point at issue.

WHEREFORE, your petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of the proceedings in case No. 8968, entitled on its docket "B. C. Schram, Receiver of First National Bank-Detroit, a National Banking Association v. Joseph L. Coyne", and that the judgment of said Circuit Court of Appeals in said case may be reversed by this Honorable Court, and that your

petitioner may have such other and further relief in the premises as this Honorable Court may seem meet.

And your petitioner will ever pray.

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